No. 32981-0-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

Trey M.,

Juvenile Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR YAKIMA COUNTY

BRIEF OF APPELLANT

LILA J. SILVERSTEIN
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711
lila@washapp.org

TABLE OF CONTENTS

A. INTRODUCTION 1

B. ASSIGNMENTS OF ERROR 2

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 2

D. STATEMENT OF THE CASE..... 4

1. Trey was a victim of serious physical abuse as an infant and was later bullied in school. 4

2. Trey regularly meets with a mental health counselor. 5

3. Trey is charged with harassment of three classmates based on statements he made to his counselor during a private therapy session. 7

4. The alleged victims testify that they do not think Trey would harm them. 8

5. The judge finds Trey guilty of three counts of felony harassment based on statements he made in therapy, tells him he "shouldn't be thinking that way," and orders him to return to therapy. 10

E. ARGUMENT 13

1. The State presented insufficient evidence to prove felony harassment under the statute. 13

a. Due Process requires the State to prove every element of the crime charged beyond a reasonable doubt. 13

b. The State failed to prove the alleged victims feared that any threat to kill would be carried out. 15

c. The State failed to prove that any fear that did exist was caused by Trey's words or conduct. 19

2. The convictions violate the First Amendment because Trey's statements were not true threats. 21

a. In light of the First Amendment, statutes criminalizing pure speech must be narrowly construed and "threats" may be prohibited only if they are "true threats." 21

b. Trey's statements were not true threats under the reasonable-speaker standard. 22

c. Trey's statements were not true threats under the subjective-intent standard. 26

3. The remedy is reversal of the convictions and dismissal of the charges with prejudice. 28

F. CONCLUSION..... 30

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

City of Seattle v. Slack, 113 Wn.2d 850, 784 P.2d 494 (1989)..... 13

State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980)..... 14

State v. Hardesty, 129 Wn.2d 303, 915 P.2d 1080 (1996) 29

State v. J.M., 144 Wn.2d 472, 28 P.3d 720 (2001)..... 15, 23

State v. Jacobs, 154 Wn.2d 596, 115 P.3d 281 (2005)..... 19

State v. Kilburn, 151 Wn.2d 36, 84 P.3d 1215 (2004)..... passim

State v. Moeurn, 170 Wn.2d 169, 240 P.3d 1158 (2010) 19

State v. Radcliffe, 164 Wn. 2d 900, 194 P.3d 250, 253 (2008)..... 26

Washington Court of Appeals Decisions

State v. Spruell, 57 Wn. App. 383, 788 P.2d 21 (1990)..... 28

United States Supreme Court Decisions

Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)..... 13

Gitlow v. New York, 268 U.S. 652, 45 S.Ct. 625, 69 L.Ed. 1138 (1925).. 21

In re Winship, 397 U.S. 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)..... 13

J.D.B. v. North Carolina, ___ U.S. ___, 131 S. Ct. 2394, 180 L. Ed. 2d 310 (2011)..... 23

Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 628, 61 L.Ed.2d 560 (1970) 14

North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969)..... 29

Virginia v. Black, 538 U.S. 343, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003) 26, 27

Constitutional Provisions

Const. art. I, § 3 13

U.S. Const. amend. I 21

U.S. Const. amend. XIV 13

Statutes

RCW 9A.46.020 ..... passim

A. INTRODUCTION

Trey M. is a 15-year-old child who suffered severe abuse and neglect as an infant and has been the victim of bullying in school. To cope with the enduring trauma, he has participated in mental health counseling for years. He learned to trust his grandmother, who is now his caregiver, and to be open about his thoughts and feelings with his therapist. In his counseling sessions, he worked through his repeated desires to kill himself and to kill his abusive grandfather.

When Trey talked to his counselor about his desire to kill three boys who had bullied him, the counselor reported the discussion to a sheriff's deputy. The deputy told a detective, who told the boys' parents, who then told the boys that they were on a "hit list." None of the boys was told what Trey actually said or that he made the statements in therapy.

Instead of increasing therapy for Trey or implementing protective measures for the boys, the State charged Trey with three counts of felony harassment, alleging that he threatened to kill each of the three boys and by his words or conduct placed the three boys in fear of death.

The resulting convictions are invalid under the statute and the First Amendment. The boys testified that they were not afraid any threat to kill would be carried out, and Trey told his therapist and the authorities that he

probably would not kill anyone because he would rather kill himself or play video games. This Court should reverse.

B. ASSIGNMENTS OF ERROR

1. The State presented insufficient evidence to prove harassment under RCW 9A.46.020(2)(b) for all three counts.

2. The convictions for all three counts violate the First Amendment to the United States Constitution.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. To convict a person of harassment, one of the elements the State must prove beyond a reasonable doubt is that the accused person "by words or conduct" placed the alleged victim "in reasonable fear" that the alleged threat "will be carried out." Here, Trey did not say anything to the alleged victims, and the statements he made to his therapist in a counseling session were never disclosed to the alleged victims, who instead were told they were on a "hit list." Must the convictions be reversed because the State failed to prove that Trey's "words or conduct" placed the alleged victims in fear? (Assignment of Error 1).

2. All three of the alleged victims were told they were on a "hit list" after Trey had already been arrested and placed in jail, and although they said they were initially scared of what *might have* happened, they all testified that they did not think Trey would harm them. Must the

convictions be reversed because the State failed to prove that the alleged victims were in fear that a threat to kill would be carried out? (Assignment of Error 1).

3. The First Amendment guarantees freedom of speech, and therefore statutes criminalizing pure speech must be narrowly construed. As relevant here, statutes prohibiting threats must be confined to "true threats," which the Washington Supreme Court has defined as "statements made in a context in which a reasonable speaker in the defendant's place would foresee that his statement would be interpreted as a serious threat to cause bodily injury or death." Here, 14-year-old Trey M. made statements about killing three classmates, but the statements were made to a therapist in a private counseling session, Trey stated he would be more likely to kill himself than to harm anyone else, and the alleged victims knew Trey to be nice and not the kind of person who would harm another. Did the State fail to prove a true threat under Washington law, rendering the convictions unconstitutional?

4. The U.S. Supreme Court has described true threats as encompassing "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence," and where the speaker has "the intent of placing the victim in fear of bodily harm or death." Here, there was no evidence and no finding that

Trey had the intent of placing the alleged victims in fear of bodily harm or death when he discussed his thoughts with his therapist. Did the State fail to prove a true threat as defined by the U.S. Supreme Court, rendering the convictions unconstitutional?

D. STATEMENT OF THE CASE

1. Trey was a victim of serious physical abuse as an infant and was later bullied in school.

Trey M. was born on November 2, 1999, and was immediately removed from his mother's custody because of her drug use. After living in foster care for two years, he was returned to his mother. RP 247.

The reunion was devastating. When Trey was only three years old, his leg was twisted and broken in two places. The abuse allegedly occurred at the hands of Trey's mother's boyfriend. Trey was again beaten by his mother's boyfriend at the age of four. RP 247.

Trey's paternal grandparents intervened and obtained custody. RP 247. They tried to provide Trey with love and stability. However, when Trey's grandfather drank alcohol he sometimes would threaten to kill Trey, his brother, and his grandmother. Ex. 2 at 7. Trey's father protected the rest of the family from the grandfather's drunken rages, but Trey's father only lived with them sporadically because he is a convicted felon who was in and out of prison. *Id.*; RP 246.

The school environment was not much better. Trey was perceived as "weird" and his classmates were cruel to him. RP 250. For years, other kids made statements to Trey that made him feel "worthless, sad, [and] fearful he would never belong and have any friends." RP 250. The students who bullied Trey were not punished; instead, Trey "was allowed to spend recess in classrooms by himself." RP 247, 250.

2. Trey regularly meets with a mental health counselor.

From the time Trey began living with his grandparents, he engaged in mental health treatment to help him cope with his traumatic childhood. RP 247. For two years beginning in the fall of 2012, his therapist was Mark Heeringa of Farm Workers' Behavioral Health Services. RP 10. The two met every other week, and primarily discussed family issues. RP 11, 23.

Perhaps not surprisingly for a pre-teen and teenager, Trey talked about games and television shows involving the "zombie apocalypse," which Mr. Heeringa interpreted as a mechanism for relieving the "stressors" in Trey's life. RP 23-24. Unfortunately, Trey also expressed a desire to kill himself, and talked about suicide on multiple occasions. RP 25. At one point he had a "specific plan" to hang himself. RP 25. Another time he talked of jumping off a bridge. *Id.* On other occasions he

discussed shooting himself or cutting his wrists. RP 28. Although Mr. Heeringa asked Trey's grandmother to make sure the guns in their house were secure, he never told law enforcement or school administrators that Trey contemplated killing himself – even when Trey "appeared with elevated suicidality." RP 28-31.

During his therapy sessions, Trey also said that he wanted to kill his grandfather and talked about how he would do it. RP 25. Trey told his therapist that it helped him deal with his anger and emotions if he could visualize killing his grandfather. RP 26. Mr. Heeringa did not report the statements to law enforcement. He stated that Trey did "not appear at risk to harm his family" because he was "open about the desire to do so." RP 26.

In October of 2014, Trey told his therapist that he wanted to kill three of his classmates who had harassed him: G.G.C., W.B., and E.C.D.. RP 13; CP 1-2. He said he thought he could find the keys to his grandfather's gun safe, and that he would shoot one boy at home and the other two at school, and then kill himself. RP 19. Mr. Heeringa said, "Doesn't this seem wrong?" Trey responded, "Who can say?" RP 20. Trey then stated that he might not do it, and would instead "just kill himself so that the boys would feel his pain." RP 34. In either event, it was "not something he was going to carry out today, but that he was

thinking about for the future." RP 34. Trey told his counselor that he was more likely to commit suicide than to kill anyone else. RP 34-36.

Mr. Heeringa decided he "needed to break confidentiality and involve law enforcement." RP 20. Mr. Heeringa did not tell Trey that he was going to disclose their private therapeutic conversations, but he called the Yakima County Sheriff's Department and told Deputy William Boyer about the statements Trey made during counseling. RP 20-21, 41-43.

3. Trey is charged with harassment of three classmates based on statements he made to his counselor during a private therapy session.

Deputies Boyer and Aguilar went to Trey's house and asked him to tell them what he had told his counselor. RP 45-46. Trey complied by repeating the statements he had made to his therapist, but he explained that it was "not an issue" because it was something "he probably really wouldn't do." RP 46-47, 54-55. During the interrogation, the deputies kept redirecting the conversation back to the topic of shooting other people. RP 59. Trey said he was "having a hard time wanting to do the wrong things," but that he "would rather just play video games" than shoot other people. RP 65-66.

The deputies nevertheless arrested Trey and booked him into jail. RP 76. Detective Mike Russell took over the case, and contacted the principal at Naches High School as well as the parents of the three boys.

RP 75-81. Although two of the mothers were very concerned, the mother of E.C.D. "was not so alarmed," and the father of G.G.C. "was not terribly alarmed." RP 80-81.

Two of the mothers told their respective sons that they were "on a hit list," and one of the boys passed the information on to the third boy. RP 87, 101-02, 120. The teens were not told what Trey actually said, or that he made his statements in a therapy session, or that he said he probably would not hurt anyone else because he would rather either kill himself or play video games. RP 83-110, 118-25. Trey was already in jail by the time the mothers told the boys that Detective Russell told them that Deputy Boyer told him that Mr. Heeringa told him that the boys were on a hit list. RP 88.

The State nevertheless charged Trey with three counts of felony harassment, alleging that he knowingly threatened to kill each of the three boys, and "did by words or conduct place the person threatened in reasonable fear that the threat would be carried out." CP 1-2.[1]

4. The alleged victims testify that they do not think Trey would harm them.

At trial, various witnesses testified to the events described above. As mentioned, none of the alleged victims testified that they learned

[1] The State also charged Trey with another count for which he was acquitted. CP 1, 26.

Trey's actual words or the context of his statements. They only testified they were told they were on a "hit list."

All three alleged victims also testified that they did not think Trey would hurt them. RP 90-91, 94, 106-07, 121-24. E.C.D. said he was "really scared" when he was first told he was "on a hit list," but he was "a little relieved" that Trey was in custody. RP 87-88. E.C.D. also said, "In my opinion, I honestly don't think Trey would have done that." RP 90. He said, "if you think about it, Trey's really - - he's really nice. I just didn't - - I don't see Trey giving me anything that - - like that." RP 91. E.C.D. said he told Detective Johnson that he was "not afraid" because Trey "was too nice of a kid." E.C.D. had "never seen Trey get violent." RP 94.

W.B. similarly testified that he was scared when his mother first told him that he was on a "hit list," but that Trey never threatened him. RP 101-06. He also said, "I know Trey, and I know that he probably wouldn't harm me." RP 106. W.B. continued:

> [Trey] might get mad at me, but I don't think he would harm me physically. We had rough patches sometimes, but we were friends since we were young and we shared a lot of memories together, so I knew that he probably - - he wouldn't hurt me like that.

RP 106-07.

G.G.C. stated that he was "freaked out" when he was first told he was on a "hit list," but that Trey had never hurt him, never argued with him, and never been confrontational or violent with anybody. RP 120, 123-24. G.G.C. testified that there was nothing about his relationship with Trey that would make him afraid that Trey would carry out the alleged threats. RP 124. In fact, there was nothing that G.G.C. knew about Trey at all that would make him afraid that Trey would kill him. RP 124.

5. The judge finds Trey guilty of three counts of felony harassment based on statements he made in therapy, tells him he "shouldn't be thinking that way," and orders him to return to therapy.

During closing argument, Trey's attorney pointed out that Trey's statements to his counselor were not true threats; they were thoughts he was having that he was working through with his therapist, with whom he had a confidential relationship. Additionally, the alleged victims all testified they had no reason to believe Trey would carry through with the alleged threats. Accordingly, Trey did not commit felony harassment as defined by the statute and caselaw. RP 207-14.

The court disagreed and found Trey guilty of three counts of felony harassment – threat to kill. CP 19, 26-27. Specifically, the court found:

> That on or about 10/7/14, respondent knowingly threatened to kill each of the three victims in this case, again [E.C.D.],

> [W.B.], and [G.G.C.]; that the words or conduct of Trey [M.] placed each victim in reasonable fear that the threat to kill would be carried out; that [Trey] act[ed] without legal authority and the threats were made or received in the state of Washington, county of Yakima.

RP 224.

At the disposition hearing, the parents of the alleged victims spoke. They conveyed their hope that their sons would be protected, but also expressed support for Trey. RP 234-45. G.G.C.'s father said he wanted "help for Trey that he gets what he needs to be able to work through his feelings so he doesn't feel like harming others or himself." RP 239. W.B.'s father stated:

> I'd like to state to Trey's family that, you know, on behalf of myself and my family, we're very sorry that this whole incident has happened. And I - - we feel very much for Trey and his future. So we just hope that things, you know, come out good for him and in his life. And if there was anything that I could have done, you know, or spoke with him, I certainly would have tried. I've coached baseball and work with students and I work with the gang-free coalition, so I care very deeply about young people. And I just wish that there was something that I could have done to help Trey when he was reaching out that I could have, you know, done to help not cause a situation like this.
>
> We are very concerned for his safety and his future, and we're very concerned for my son and the other young gentlemen that were threatened and put into situations. So hopefully, you know, the Court will decide and make things work out best for not only our side and our kids, but for his - - for Trey and his family also.

RP 245.

Trey's grandmother also spoke, explaining that Trey endured a great deal of "pain and torture" before the age of four, that he "wrestles with thoughts in his head every day," and that therapy has helped him address these issues. RP 249. Ms. M. noted that Trey spoke openly and truthfully with his therapist and with the deputy, but never said anything to the alleged victims. RP 249. She expressed empathy for the parents of the three boys, but also emphasized that Trey had been deeply hurt by the words of other kids for years. RP 249-50. Ms. M. said, "Does this give Trey an excuse to say those words? No. But they were only thoughts in his head talking to his therapist." RP 250.

Trey's pastor, Toby Ridell, then addressed the court. RP 251. He said that Trey had learned to work through his thoughts and feelings through years of therapy, and had learned to trust adults and be honest with his therapist. RP 252. He stated that everyone should feel at peace because Trey gets help for himself and "[i]f he has an issue in his life, he's going to talk about it…." RP 252. He expressed hope that this pattern would continue. *Id.*

The court recognized that Trey had already been incarcerated for 73 days, during which he had to spend his birthday and Thanksgiving in jail instead of at home with his family. RP 246. The judge accordingly imposed a sentence of time served. RP 262-63.

The court acknowledged that "this is a difficult, sad case" for all involved. RP 257-58. The judge said:

> I think Trey's learned that you can't make a plan to kill people and tell anybody about it, including your therapist. But on the other hand, you shouldn't be thinking that way. So that's the problem.

RP 258. After telling Trey that he should not think certain thoughts or share such thoughts with a therapist, the judge ordered Trey to return to therapy and required him to participate in at least one session before he could go back home. RP 262-63.

E. ARGUMENT

1. The State presented insufficient evidence to prove felony harassment under the statute.

a. Due Process requires the State to prove every element of the crime charged beyond a reasonable doubt.

The State bears the burden of proving each element of the crime charged beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). A criminal defendant's fundamental right to due process is violated when a conviction is based upon insufficient evidence. *Id.*; U.S. Const. amend. XIV; Const. art. I, § 3; *City of Seattle v. Slack*, 113 Wn.2d 850, 859, 784 P.2d 494 (1989). On appellate review, evidence is sufficient to support a conviction

only if, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 318, 99 S.Ct. 628, 61 L.Ed.2d 560 (1970); *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

The State charged Trey with three counts of felony harassment, alleging that he threatened to kill E.C.D., W.B., and G.G.C. CP 1-2. The statute at issue provides, in relevant part:

> (1) A person is guilty of harassment if:
>
> (a) Without lawful authority, the person knowingly threatens:
>
> (i) To cause bodily injury immediately or in the future to the person threatened or to any other person; … and
>
> (b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out. "Words or conduct" includes, in addition to any other form of communication or conduct, the sending of an electronic communication.
>
> (2) (a) Except as provided in (b) of this subsection, a person who harasses another is guilty of a gross misdemeanor.
>
> (b) A person who harasses another is guilty of a class C felony if any of the following apply: … (ii) the person harasses another person under subsection (1)(a)(i) of this section by threatening to kill the person threatened or any other person; ….

RCW 9A.46.020. As explained below, the State's proof was deficient as to multiple elements of this statute. Each deficiency independently requires reversal and dismissal of the convictions.

b. The State failed to prove the alleged victims feared that any threat to kill would be carried out.

One of the elements the statute requires the State to prove is that the defendant placed the victim in fear "that the threat will be carried out." RCW 9A.46.020(1)(b). In *J.M.*, for instance, this element was satisfied as to one victim, the school principal, because the principal was afraid for his personal safety after hearing the threat. *State v. J.M.*, 144 Wn.2d 472, 475, 28 P.3d 720 (2001). But there was insufficient evidence to satisfy the fear element on another count for which the alleged victim was a different administrator, because that alleged victim did not learn of the threat until after the defendant had been arrested and placed in detention. *Id.* at 476 n.2.

All three counts in this case fall in the latter category. All three boys learned of the alleged threat after Trey had already been arrested and placed in detention. Furthermore, all three boys testified they did not fear Trey would kill them. Thus, the State presented insufficient evidence as a matter of law to prove this element.

E.C.D., the alleged victim in count four, was the first classmate to testify. He stated that when he heard he was on a "hit list" Trey allegedly created, he "was scared that my life *could have been* taken." RP 87 (emphasis added). But since Trey was already in jail by the time he

learned of the alleged hit list, he felt "a little relieved." RP 88. He explained, "after he was in custody, I felt relieved that he couldn't fulfill the hit list." RP 90.

E.C.D. further testified, "I honestly don't think Trey would have done that." RP 90. He explained, "I was scared because of the hit list, but if you think about it, Trey's really - - he's really nice. I just didn't - - I don't see Trey giving me anything that - - like that." RP 91.

Thus, the State failed to prove beyond a reasonable doubt that E.C.D. was in fear "that the threat will be carried out." RCW 9A.46.020(1)(b). Although he was "scared" that his life "could have been taken" if authorities had not intervened, he was not scared that his life *would be* taken. Because a harassment conviction requires proof that the victim feared that the threat would be carried out, the conviction on count four cannot stand.

The alleged victim on count three, W.B., testified similarly. After W.B. repeatedly denied that Trey ever threatened him, the prosecutor finally asked W.B. if he had "any knowledge of a hit list." RP 101. W.B. said he did because his mother had told him. RP 101, 105. He said when his mother told him he was on a hit list, he was "scared" and "shaking," and "dumbfounded at what happened," but he never testified that he was in fear that the alleged threat would be carried out. RP 106. In fact, he

stated, "I know Trey, and I know that he probably wouldn't harm me. I know him well enough, like, that he might think of me like that, but I know he wouldn't harm me." RP 106. He clarified, "he might get mad at me, but I don't think he would harm me physically." The prosecutor asked, "When did you come to that decision?" W.B. responded, "right when I found out." RP 106.

W.B. repeatedly explained that Trey was not the type that would hurt other people. RP 106-07. He also specifically thought Trey would not hurt him because of their shared history:

> I knew that me and Trey had our, like, rough patches sometimes when we were - - when we were friends, but I know that we were friends since we were young and we shared a lot of memories together, and so I knew that he probably - - he wouldn't hurt me like that.

RP 106-07.

Thus, as with E.C.D., the State failed to prove beyond a reasonable doubt that W.B. was in fear "that the threat will be carried out." RCW 9A.46.020(1)(b). To the contrary, W.B. testified that he decided as soon as he found out about the alleged threat that he did not think Trey would harm him. RP 106. The conviction on count three should accordingly be reversed.

Finally, the State also failed to prove this element on count two, for which the alleged victim was G.G.C. Like E.C.D., G.G.C. said that when

he heard about a "hit list," he was "freaked out" and "scared" because he did not know "if it actually could have happened." RP 120-21. G.G.C. had not been at school that day, and he was scared to think what might have happened if he had been at school. RP 121.

When he went back to school, G.G.C. felt "[a] little freaked out" about "what everyone at school would be thinking or feeling or, like, if - - like what kind of questions I might get asked about it." RP 123. But he did not testify that he was scared that Trey would kill him. In fact, he stated that Trey had never hurt him or even argued or fought with him. RP 123-24. He had never seen Trey be confrontational or violent with anybody, and there was nothing about the relationship he had with Trey that would make him afraid that Trey would carry out the alleged threats. RP 124.

Accordingly, as with the other alleged victims, the State failed to prove that G.G.C. was in fear "that the [alleged] threat will be carried out." RCW 9A.46.020(1)(b). Like E.C.D., G.G.C. was "freaked out" thinking about what *might* have happened had things occurred differently in the past, but he did not testify that he was ever afraid that something bad *would* happen.

Proof that the alleged victim fears that a threat to kill will be carried out is required to sustain a conviction for felony harassment.

Because the State failed to prove this element for all three counts, the convictions should be reversed and the charges dismissed with prejudice.[2]

c. The State failed to prove that any fear that did exist was caused by Trey's words or conduct.

Even if the State had proved that the alleged victims feared death, the convictions would have to be reversed because the State failed to prove that *Trey's* "words or conduct" caused the fear, as required under the statute. *See* RCW 9A.46.020(1)(b). Because the statute is clear on its face, its meaning is to be derived from the language alone. *See State v. Moeurn*, 170 Wn.2d 169, 174, 240 P.3d 1158 (2010). To the extent it could possibly be deemed ambiguous, it must be interpreted strictly in Trey's favor and against the State. *See State v. Jacobs*, 154 Wn.2d 596, 603, 115 P.3d 281 (2005). The statute was not satisfied here.

None of the three alleged victims testified that they heard Trey's statements, either directly or indirectly. Nor did they testify that they had any idea the alleged statements were made to a mental health counselor during a therapy session. Instead of hearing any of the statements Trey made or the context of the statements, the boys were told they were on a "hit list." RP 87, 101-02, 120. This is insufficient under the statute,

[2] If the Court reverses on this basis, it need not reach the alternative arguments set forth below.

which requires proof beyond a reasonable doubt that the defendant's own words or conduct caused the requisite fear. RCW 9A.46.020(1)(b).

W.B. himself understood that Trey's words did not cause him fear. At trial, the prosecutor asked him, "Did Trey ever threaten you … [i]n any way?" RP 101. W.B. said, "No." RP 101. The prosecutor persisted, "Never? Did you ever hear about it?" W.B. responded, "No." RP 101. W.B. explained, "he never really told me, like, oh, he was going to hurt me if I did something, or I'll hurt your - - like, I'll just harm you in any way, like, verbal or anything." RP 101.

It is not surprising that the State could not prove this element of the crime. What occurred in this case was like the childhood game of "telephone," wherein a statement is altered each time it is passed on to another person, until it bears only slight resemblance to the original utterance by the time it reaches the end of the line. Here, Trey made statements to a therapist, who then spoke to Deputy Boyer, who wrote a report for Detective Russell, who spoke to the parents, who then talked to the boys. By the time the boys were told something, both the actual statements and their context were completely eradicated in favor of an intermediary's summary statement that there was a "hit list." This is insufficient under the statute.

In sum, serious felony convictions that will be on a child's record for life may not be based on a game of "telephone." The State failed to prove that Trey's "words or conduct" placed the alleged victims in fear that they would be killed. This failure provides an independent basis for reversal and dismissal of all three counts.

2. The convictions violate the First Amendment because Trey's statements were not true threats.

a. In light of the First Amendment, statutes criminalizing pure speech must be narrowly construed and "threats" may be prohibited only if they are "true threats".

The harassment statute criminalizes pure speech, and therefore "must be interpreted with the commands of the First Amendment clearly in mind." *State v. Kilburn*, 151 Wn.2d 36, 41, 84 P.3d 1215 (2004); *see* U.S. Const. amend. I (government may not abridge freedom of speech); *Gitlow v. New York*, 268 U.S. 652, 666, 45 S.Ct. 625, 69 L.Ed. 1138 (1925) (First Amendment applies to the states through the Fourteenth Amendment). Because the right to free speech is "vital," only a few narrow categories of communication may be proscribed. *Kilburn*, 151 Wn.2d at 42. Although a "threat" is one of those categories, the only type of threat which may be criminalized without running afoul of the First Amendment is a "true threat." *Id.* at 43.

As explained below, under either the Washington Supreme Court's definition of "true threat" or the United States Supreme Court's definition of "true threat," the State failed to meet its burden to prove that Trey's statements to his mental health provider fell outside the protection of the First Amendment.

b. Trey's statements were not true threats under the reasonable-speaker standard.

The Washington Supreme Court has defined a true threat as "a statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted as a serious expression of intention to inflict bodily harm upon or to take the life of another person." *Kilburn*, 151 Wn.2d at 43 (internal quotations omitted). This is an objective standard that focuses on the viewpoint of a reasonable speaker under all of the circumstances. *Id.* at 44.

Given "the First Amendment values at issue," this is "a difficult standard to satisfy." *Id.* at 53. Not only is the State's burden weighty, but the reviewing court also must "be exceedingly cautious when assessing whether a statement falls within the ambit of a true threat in order to avoid infringement on the precious right to free speech." *Id.* at 49.

In this case, the State failed to meet its weighty burden to show that Trey's statements to his therapist were true threats rather than

protected speech. A reasonable person in Trey's circumstances would not have foreseen his statements as a serious expression of intention to inflict harm.

To begin with, Trey was only 14 years old. *Cf. J.D.B. v. North Carolina*, ___ U.S. ___, 131 S. Ct. 2394, 2399, 180 L. Ed. 2d 310 (2011) (child's age is part of totality-of-circumstances analysis of whether a reasonable person in defendant's position would feel free to leave during an interrogation). Furthermore, he was speaking to his therapist, with whom he had worked through his thoughts and feelings for years. His therapist had never before divulged their private conversations to law enforcement – even those involving plans to kill himself and his grandfather – and a reasonable child in Trey's position would not foresee that he would do so in this instance.[3] Even if a reasonable person in Trey's position had foreseen the ultimate disclosure to the alleged victims,

[3] Although the Court in *J.M.* stated that the defendant need not know that a statement will be communicated to the alleged victim in order for it to be a true threat, *J.M.*, 144 Wn.2d at 479-80, a lack of knowledge on this point is certainly part of the totality of circumstances that must be considered in any "reasonable person" inquiry. *See Kilburn*, 151 Wn.2d at 44 ("true threat" determination must be based on point of view of reasonable speaker *under all of the circumstances*).

all of the boys knew Trey to be nice and not the type of person who would harm anyone.[4]

Kilburn is instructive. There, the Supreme Court held that the State failed to present sufficient evidence of a true threat even though the defendant directly told another student, "I'm going to bring a gun to school tomorrow and shoot everyone and start with you," and "there's nothing an AK 47 wouldn't solve." *Kilburn*, 151 Wn.2d at 38-39. The listener originally thought the defendant might have been joking, but "the more she thought about it the more she became afraid that Kilburn was serious." *Id*. at 39. Despite the defendant's direct statements of intention to harm others and the classmate's increasing fear, the Supreme Court reversed for insufficient evidence of a true threat because the defendant was "half smiling" when he said he was going to shoot everyone, and he began giggling after making the statement. *Id*. at 52. Also, the defendant and the alleged victim had known each other for two years and the defendant had always treated her nicely. *Id*. Thus, even looking at all of

[4] Because there were three separate counts and the named victims were the three boys, not the therapist, the analysis must be whether a reasonable person in Trey's position would foresee that the three boys would take the statement as a serious expression of intent to inflict harm, not whether a reasonable person in Trey's position would foresee that the therapist would so interpret the statement. CP 1-2. In any event, the State did not prove a true threat regardless of the alleged victim.

the evidence in the light most favorable to the State, there was insufficient evidence of a true threat. *Id*. at 54.

If the statements in *Kilburn* were not true threats, the statements Trey made certainly were not. The defendant in *Kilburn* directly told a fellow student he was going to bring a gun to school and kill her and other students – yet this was still not enough to constitute a true threat. Here, Trey similarly stated that he thought he wanted to take a gun to school and kill fellow students, but he stated it to a mental health counselor in the context of counseling. Furthermore, whereas the defendant in *Kilburn* heightened the urgency of the situation by stating his plan to commit mass murder "tomorrow," Trey's statements were much more vague. The alleged plan was "not something he was going to carry out today, but that he was thinking about for the future." RP 34. In fact, Trey told his counselor that he was more likely to commit suicide than to kill anyone else. RP 34-36. Finally, as in *Kilburn*, Trey and the alleged victims had known each other for a while and the other boys knew Trey to be nonviolent. *Compare Kilburn*, 151 Wn.2d at 52 *with* RP 91, 106-07, 123-24.

In sum, as the Court stated in *Kilburn*, the true-threat standard is "a difficult standard to satisfy." *Id*. at 53. The State has failed to satisfy it in this case, providing another independent basis for reversal.

c. Trey's statements were not true threats under the subjective-intent standard.

Not only did the State fail to prove Trey's statements were true threats under the reasonable-speaker standard, it also failed to prove the statements were true threats under the subjective-intent standard set forth in *Virginia v. Black,* 538 U.S. 343, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003). Because the United States Supreme Court is the ultimate authority with respect to federal constitutional law, this standard must be satisfied as well. *See State v. Radcliffe*, 164 Wn. 2d 900, 906, 194 P.3d 250, 253 (2008) ("When the United States Supreme Court decides an issue under the United States Constitution, all other courts must follow that Court's rulings").

In *Black*, the Court stated, "'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Black*, 538 U.S. at 359. The Court held that Virginia could ban "cross burning with intent to intimidate," because "[i]ntimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death." *Id.* at 360.

The Court invalidated a portion of the statute creating a rebuttable presumption that any cross-burning was done with intent to intimidate. *Id.* at 364 (Lead Opinion); *id.* at 368 (Stevens, J., concurring); *id.* at 380-81 (Souter, J., concurring in part and dissenting in part). Another opinion concurring in part and dissenting in part agreed that one defendant's conviction was invalid because an instruction allowed the jury to convict him based on cross-burning alone, regardless of whether there was evidence rebutting the State's showing of an intent to intimidate. *Id.* at 379-80 (Scalia, J., concurring in part and dissenting in part). Thus, a majority of the Court held that proof of subjective intent to intimidate was constitutionally required.

Applying this requirement to the facts, the Court invalidated the convictions of all three defendants in two consolidated cases. *Black*, 538 U.S. at 367-68. The convictions were reversed even though (1) all of the defendants burned crosses, (2) the burning crosses caused people to fear harm, and (3) this fear was reasonable in light of the context and history of cross-burning. *See id.* at 348-50. The Court concluded that because of the vital values protected by the First Amendment, even making statements that cause fear of violence is protected unless the statements were made with a purpose of causing that fear. *Id.* at 360.

Trey's convictions are unconstitutional under *Black*. The judge did not find that Trey made the statements to his therapist with the intent to intimidate the alleged victims, and there was no evidence presented from which the judge could have made such a finding. Indeed, the trial judge implicitly acknowledged the lack of intent even after finding Trey guilty. She said that Trey's therapist "was concerned enough that he reported it and, basically, things snowballed and a lot of people found out about it and it became very, very frightening for a lot of people." Under *Virginia v. Black*, this is insufficient to support a conviction consistent with the First Amendment. For this reason, too, the convictions should be reversed.

3. The remedy is reversal of the convictions and dismissal of the charges with prejudice.

In the absence of evidence from which a rational trier of fact could find beyond a reasonable doubt that Trey committed the elements of the offenses of which he was convicted, the judgment may not stand. *State v. Spruell*, 57 Wn. App. 383, 389, 788 P.2d 21 (1990). The same is true of convictions obtained in violation of the First Amendment. *Kilburn*, 151 Wn.2d at 54.

Double Jeopardy prohibits a second prosecution for the same offense after a reversal for lack of sufficient evidence. *State v. Hardesty*,

129 Wn.2d 303, 309, 915 P.2d 1080 (1996) (citing *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969)). The appropriate remedy for the errors in this case is reversal of the convictions and dismissal of the charges with prejudice.

F. CONCLUSION

Children experiencing trauma should be encouraged to express their thoughts and feelings to mental health professionals. Although therapists are permitted to report concerns about potential violence to authorities, such reporting should result in protective measures for potential victims and enhanced treatment for the child – not felony prosecutions that will deter the child from continuing to participate openly in counseling.

Such policy considerations are consistent with the Due Process requirement of proof beyond a reasonable doubt of all elements of a crime, and the First Amendment requirement of permitting freedom of speech except in narrow circumstances where the speaker has issued a true threat. Neither the statutory or constitutional requirements were satisfied in this case. The convictions should be reversed and the charges dismissed with prejudice.

Respectfully submitted this 23rd day of April, 2015.

/s Lila J. Silverstein
Lila J. Silverstein – WSBA 38394
Washington Appellate Project
Attorney for Appellant